National Union of Hotel, Bar and Restaurant Workers Peninsular Malaysia v Shangri-la Hotels (M) Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2181–09 OF 2012
LINTON ALBERT, ROHANA YUSUF AND VERNON ONG JJCA
2 SEPTEMBER 2014

Contract — Agreement — Supplementary agreement — Appeal against decision of High Court in quashing award of Industrial Court — Application for interpretation of supplementary agreement — Whether court ought not to be overly legalistic in approach to decipher true intent of contracting parties — Whether it was commercial agreement

An application was filed by the respondent ('Shangri-La Hotels') for the interpretation of a supplementary agreement entered into between the respondent, hotel and the National Union of Hotel, Bar and Restaurant Workers Peninsular Malaysia. The Industrial Court handed down its award to the effect that, instead of the supplementary agreement, the collective agreement applied and that the old terms and conditions of employment and organisational structure will apply upon the re-opening of the new hotel. Dissatisfied, Shangri-La Hotel filed an application to the High Court for judicial review of the Industrial Court's award. The High Court judge granted an order of certiorari quashing the Industrial Court's award; and a declaration that pursuant to cll 2.1(d)(i) and (iii) and 3.1 of the supplementary agreement, Shangri-La Hotel was entitled to set new terms and conditions of employment and organisational structure, category and positions for the new resort and such new terms are the terms of the collective agreement in force for the resort from the date of the re-opening of the resort. The appellant ('the union') being dissatisfied with the decision of the High Court appealed against the decision. The union took issue with that action by the applicant as it was of the view that the old collective agreement that was in force prior to the closing down of the hotel ought still to govern the employment terms between the two parties. The union's argument was that the clauses in question ought to be read harmoniously; and that consequently, upon the re-opening of the resort, the supplementary agreement becomes null and void and the collective agreement and the old terms and conditions of employment will continue to apply. Learned counsel for the union submitted that in construing a collective agreement, the court ought not to be overly legalistic in its approach in trying to decipher the true intent of the contracting parties and that it was important to bear in mind that it was not a commercial agreement. The hotel's argument was that clauses in question were inherently contradictory clauses and could

not be read harmoniously. Clause 2.1 of the supplementary agreement ought to prevail so that upon the re-opening of the resort, new terms and conditions as determined by the hotel would apply.

Held, dismissing the appeal with costs of RM10,000:

(1) The task of construing the supplementary agreement should be undertaken with an appreciation of the factual background. In this case, the redevelopment exercise was a major undertaking. It required the complete cessation of business and the closure of the hotel for a period of 19 months (from 1 December 2004 until it re-opened on 28 September 2006) and the retrenchment of the employees of the old hotel. Meanwhile, in May 2006 the hotel commenced the recruitment of employees for the new hotel. Thereafter, the hotel entered into contracts of employment with the employees of the new hotel on fresh terms of employment (see para 24).

(2) Read in isolation, the clauses in question were clear on their intent of each of the parties. Read together, they bring uncertainty in deciphering what the real intent of the parties was. Clause 3.1 cannot stand because it defeats the intention of the parties. The hotel and the union negotiated and agreed on a compromise for the redevelopment exercise. Under the supplementary agreement, the hotel agreed to offer improved retrenchment benefits totalling RM20m and further agreed to ensure a minimum of 100 job offers on new terms and conditions. The hotel spent about RM98m for the redevelopment exercise which entailed adopting a new business model with new terms and conditions and organisational structure for it to be viable and sustainable in the long term. To revert to the old collective agreement would have defeated the entire spirit and intent of the supplementary agreement (see para 26).

(3) The High Court judge adopted the correct approach in interpreting the contradictory clauses where he held that effect should be given to cl 2.1(d) which carries the real intention of the parties. Clause 3.1 was rejected because it is repugnant and defeats the entire purpose and intention of the parties in entering into the supplementary agreement (see para 27).

[Bahasa Malaysia summary

Permohonan difailkan oleh responden ('Shangri-La Hotels') untuk tafsiran perjanjian tambahan yang dimasuki di antara responden, hotel dan Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran Semenanjung Malaysia. Mahkamah Perusahaan memberikan awardnya mengakibatkan, sepatutnya perjanjian tambahan, tetapi perjanjian kolektif diguna pakai dan bahawa terma-terma dan syarat pekerjaan yang lama dan struktur organisasi akan diguna pakai atas pembukaan semula hotel baru tersebut. Tidak puas hati,

Hotel Shangri-La memfailkan permohonan kepada Mahkamah Tinggi untuk semakan kehakiman award Mahkamah Perusahaan. Hakim Mahkamah Tinggi memberikan perintah certiorari membatalkan award Mahkamah Perusahaan; dan perisytharan bahawa berikutan klausa 2.1(d)(i) dan (iii) dan 3.1 perjanjian tambahan, Hotel Shangri-La berhak untuk menetapkan terma dan syarat pekerjaan baru dan struktur organisasi, kategori dan jawatan untuk tempat peranginan baru tersebut dan terma-terma baru sedemikian adalah terma-terma perjanjian kolektif berkuat kuasa untuk tempat peranginan tersebut dari tarikh pembukaan semula tempat peranginan tersebut. Perayu ('kesatuan') tidak puas hati dengan keputusan Mahkamah Tinggi merayu terhadap keputusan tersebut. Kesatuan membantah tindakan oleh pemohon kerana ia berpendapat bahawa perjanjian kolektif lama yang berkuatkuasa sebelum penutupan hotel tersebut patut masih mengawal terma-terma pekerjaan di antara kedua-dua pihak. Hujahan kesatuan adalah bahawa klausa-klausa yang dipersoalkan patut dibaca secara harmoni; dan bahawa akhirnya, atas pembukaan semula tempat peranginan tersebut, perjanjian tambahan menjadi batal dan tak sah dan perjanjian kolektif dan terma-terma dan syarat pekerjaan yang lama akan terus digunapakai. Peguam yang bijaksana bagi pihak kesatuan berhujah bahawa dalam mentafsir perjanjian kolektif, mahkamah patut tidak terlalu bersifat perundangan dalam pendekatannya dalam mencuba untuk mentafsirkan niat sebenar pihak-pihak berkontrak dan bahawa ia adalah penting untuk mengambil kira bahawa ia bukan perjanjian komersial. Hujahan hotel adalah bahawa klausa-klausa yang dipersoalkan adalah sememangnya bercanggah dan tidak boleh dibaca secara harmoni. Klausa 2.1 perjanjian tambahan patut mengatasi dengan itu atas pembukaan semula tempat peranginan tersebut, terma-terma dan syarat baru seperti yang ditentukan oleh hotel akan diguna pakai.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Tugas mentafsir perjanjian tambahan patut dilakukan dengan penghargaan kepada latar belakang fakta. Dalam kes ini, pelaksanaan pembangunan semula adalah usaha yang besar. Ia memerlukan perhentian lengkap perniagaan dan penutupan hotel untuk tempoh selama 19 bulan (dari 1 Disember 2004 sehingga ia dibuka semula pada 28 September 2006) dan pemberhentian pekerja-pekerja hotel lama. Sementara itu, pada bulan Mei 2006 hotel memulakan perekrutan pekerja-pekerja untuk hotel baru. Kemudiannya, hotel memasuki kontrak pekerjaan dengan pekerja-pekerja baru hotel atas terma-terma pekerjaan yang baru (lihat perenggan 24).

(2) Klausa yang dipersoalkan apabila dibaca secara berasingan adalah jelas atas niat mereka terhadap setiap pihak-pihak. Dibaca bersama, ia membawa kepada ketidakpastian dalam mentafsir apa niat sebenar pihak-pihak. Klausa 3.1 tidak dapat bertahan kerana ia menggagalkan niat pihak-pihak. Hotel dan kesatuan berunding dan bersetuju atas

kompromi untuk pelaksanaan pembangunan semula. Di bawah perjanjian tambahan, hotel bersetuju untuk menawarkan faedah pemberhentian berjumlah sebanyak RM20 juta dan selanjutnya bersetuju untuk memastikan 100 tawaran pekerjaan minima atas terma-terma dan syarat baru. Hotel berbelanja lebih kurang sebanyak RM98 juta untuk pelaksanaan pembangunan semula yang melibatkan penggunaan model perniagaan baru dengan terma-terma dan syarat baru dan struktur organisasi untuk ia menjadi berdaya maju dan bertahan dalam tempoh yang lama. Untuk kembali kepada perjanjian kolektif akan menggagalkan keseluruhan semangat dan niat perjanjian tambahan (lihat perenggan 26).

(3) Hakim Mahkamah Tinggi mengguna pakai pendekatan yang betul dalam mentafsir klausa-klausa yang bercanggah tersebut di mana beliau memutuskan bahawa kesan patut diberikan kepada klausa 2.1(d) yang mengandungi niat sebenar pihak-pihak. Klausa 3.1 ditolak kerana ia adalah bertentangan dan menggagalkan tujuan dan niat keseluruhan pihak-pihak dalam memasuki perjanjian tambahan (lihat perenggan 27).]

Notes

For cases on agreement in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3255–3345.

Cases referred to

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, HC (refd)

Chan Hock Liong v Associated Motor Industries (M) Sdn Bhd [2007] 6 MLJ 323, CA (refd)

Forbes v Git [1922] 1 AC 256, PC (refd)

Kesatuan Pekerja-Pekerja Perkayuan v Sykt Jengka Sdn Bhd [1996] 3 MLJ 464; [1997] 2 CLJ 276, CA (refd)

National Union of Hotel, Bar Restaurant Workers Peninsular Malaysia v Tanjong Jara Beach Hotel Sdn Bhd [2003] 3 MLJ 49, CA (refd)

Nicolene Ltd v Simmonds [1953] 1 QB 543, CA (refd)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)

Totara Investments Ltd v Crismac Ltd [2010] NZSC 36, SC (refd)

Walker v Giles and Fort (1848) 6 CB 662 (refd)

Legislation referred to

Industrial Relations Act 1967 s 30(5)

Appeal from: Application for Judicial Review No R1–25–112 of 2011 (High Court, Kuala Lumpur)

Ambiga Sreenevasan (Shireen Selvaratnam and James Au with her) (Sreenevasan) for the appellant.
Firoz Hussein (Cheng Mai and Muhammad Asmirul with him) (Hafarizam Wan & Aisha Mubarak) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] In 2006, an application was filed by Shangri-La Hotels (M) Bhd for the interpretation of a supplementary agreement dated 13 January 2005 entered into between the respondent, hotel and the National Union of Hotel, Bar and Restaurant Workers Peninsular Malaysia. On 8 April 2011, the Industrial Court handed down its award to the effect that, instead of the supplementary agreement, the collective agreement dated 19 June 2003 applied and that the old terms and conditions of employment and organisational structure will apply upon the re-opening of the new hotel.

[2] Dissatisfied, Shangri-La Hotel filed an application to the High Court for judicial review of the Industrial Court's award. On 30 July 2012, the learned High Court judge granted:

(a) an order of certiorari quashing the Industrial Court's award; and

(b) a declaration that pursuant to cl 2.1(d)(i) and (iii) and cl 3.1 of the supplementary agreement, Shangri-La Hotel is entitled to set new terms and conditions of employment and organisational structure, category and positions for the new resort and such new terms are the terms of the collective agreement in force for the resort from the date of the re-opening of the resort.

[3] The National Union of Hotel, Bar and Restaurant Workers Peninsular Malaysia being dissatisfied with the decision of the High Court appealed to the Court of Appeal. On 2 September 2014, we dismissed the appeal after having heard counsel of the parties. We now set out the grounds of our decision. For convenience, the appellant shall be referred as the union and the respondent as the hotel respectively in the grounds of judgment.

BRIEF ACCOUNT OF THE SALIENT FACTS

[4] The factual background of this case has been concisely summarised by the learned High Court judge and they are reproduced below:

2. The Industrial Court was invited to interpret the true intention of the parties as contained in the provisions of the said supplementary agreement that had since brought much uncertainly in its interpretation to both parties, namely the applicant hotel and the respondent union. 'This is an amended application in Form M by Shangri-La Hotel (M) Bhd (hereinafter referred to as 'the Applicant') dated 30 October 2006 for an interpretation of cl 2.1(d) and cl 3.1 of the supplementary agreement dated 13 January 2005, cognisance number 2-209/2003-5 (hereinafter referred to as 'the said supplementary agreement') between the applicant and the National Union of Hotel, Bar and Restaurant Workers Peninsular Malaysia (hereinafter referred to as 'the union').

3. The court dismissed a preliminary objection by the applicant on 15 April 2010 that the union did not have any locus standi to appear in these proceedings vide Award 490 of 2010.

4. The parties had entered into the tenth collective agreement dated 19 June 2003, cognisance number 209/2003 (hereinafter referred to as 'the said collective agreement'). The trade name of the applicant as stated in the said collective agreement is Shangri La Rasa Sayang Resort.

5. The applicant owned and operated a hotel/resort under its trade name which was known as Shangri-La's Rasa Sayang Resort at Batu Ferringhi, Penang (hereinafter referred to as 'the old hotel'). The applicant embarked on a major re-development and re-positioning of the old hotel which entailed a complete cessation of business and the closure of the old hotel from 1 December 2004. The employees of the old hotel were retrenched.

6. When it re-opened on 28 September 2006, it was renamed Shangri-La's Rasa Sayang Resort and Spa (hereinafter referred to as 'the new hotel'). The new hotel commenced recruitment exercise of employees in May 2006. The Applicant entered into contract of employment with the employees of the new hotel on fresh terms of employment.

7. The union took issue with that action by the applicant as it was of the view that the old collective agreement that was in force prior to the closing down of the hotel ought still to govern the employment terms between the two parties. The applicant did not agree and thus this matter was referred to the Industrial Court for an interpretation of the contentious clauses in the supplementary agreement. The relevant provisions in the said supplementary agreement have been basically cl 2.1(d) and cl 3.1 therein.

Perhaps, it would be opportune to reproduce those two clauses at this juncture:

2.1 Clause (d) The Company agrees that upon the re-opening of the Hotel in furtherance to the Redevelopment/ Renovation Exercise, the Company shall ensure that a minimum of 100 positions of various categories are offered to the said Employees on the following basis:–

(i) The Company shall determine the organization structure, category and position of such vacancies;

(ii) All the said Employees who wish to be employed shall have the right to apply for any such vacancies. The Company shall ensure that applications from the said Employees shall be considered favorably; and

(iii) Such said Employees will be employed upon new terms and conditions as may be set by the Company.

2.1 Clause (e) The parties agree and confirm that this agreement is in full and final settlement of all claims arising from the Closure and Redevelopment/ Renovation Exercise.

3. Duration and limitation

3.1 It is hereby agreed between the parties hereto that this Supplementary Agreement shall expire and become null and void upon re-opening of the Hotel. Thereafter the provisions of the said Collective Agreement shall continue to apply for such period as provided for in the said Collective Agreement as if this Supplementary Agreement had not been entered into.

3.2 It is hereby agreed between the parties hereto that the provisions of this Supplementary Agreement is entered into only because of the special circumstances arising from the Closure and Redevelopment/ Renovation Exercise and shall not be treated as a precedent or basis of any future negotiations.

8. The positions taken by the two parties could be seen quite clearly from the award of the Industrial Court and after considering the arguments by both parties, the Industrial Court ruled in favour of the union, in that intention of the parties when they signed the supplementary agreement has been that they had intended the said agreement to expire on the re-opening of the hotel as a new hotel. That award was achieved as a result of the Industrial Court having read the relevant provisions which were under scrutiny with reference to the standard legal principles concerned in the interpretation of collective agreements. That result, as contained in the Award No 468 had occasioned much grief to the applicant hotel, thereby causing it to make an application to this court so that a certiorari could be issued to quash the said Award No 468 that was being impugned before this court.

PRINCIPAL ISSUE FOR DETERMINATION

[5] This appeal turns on the interpretation of cl 2.1(d) and (e) and cl 3 of the supplementary agreement; in particular whether the said clauses ought to be read harmoniously, and if not, whether cl 2.1(d) and (e) or cl 3.1 should prevail.

The union's argument

[6] The union's argument is that the clauses in question ought to be read harmoniously; and that consequently, upon the re-opening of the resort, the supplementary agreement becomes null and void and the collective agreement and the old terms and conditions of employment will continue to apply.

[7] Learned counsel for the union submitted that in construing a collective agreement, the court ought not to be overly legalistic in its approach in trying to decipher the true intent of the contracting parties and that it was important to bear in mind that it was not a commercial agreement. In support of her proposition, she cited *Kesatuan Pekerja-Pekerja Perkayuan v Sykt Jengka Sdn Bhd* [1996] 3 MLJ 464; [1997] 2 CLJ 276 (CA) and *National Union of Hotel, Bar Restaurant Workers Peninsular Malaysia v Tanjong Jara Beach Hotel Sdn Bhd* [2003] 3 MLJ 49 (CA). The ordinary rules of construction do not apply because of the special provision of s 30(5) of the Industrial Relations Act 1967 ('the IRA 1967'). In construing the clauses in question the court should act according to equity, good conscience and substantial merits of the case while at the same time not be bound by technicalities and legal form.

[8] Firstly, it was submitted that the learned High Court judge wrongly quashed the Industrial Court award because there was no basis to depart from the principles of interpretation laid down in *Jengka* for the interpretation of a collective agreement. There is no evidence that the supplementary agreement was prepared with the assistance of a senior and experienced lawyer who acted for the union.

[9] Secondly, even applying the ordinary rules of construction, cl 3.1 ought to prevail. Learned counsel adverted to the established principles of construction which were summed up in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at p 109 as follows:

> It is trite law that the primary duty of the court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words are unambiguous the court must give effect to them notwithstanding that the result may appear capricious or unreasonable and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.

[10] Learned counsel submitted that the supplementary agreement envisages the continued role of the union upon the re-opening of the hotel and was intended to settle the trade dispute concerning increased retrenchment benefits as set out in cl 1. Clause 3.1 is unambiguous and can be read harmoniously with cl 2.1. As such, it would be reasonable to interpret the clauses in question to mean that upon re-opening of the new hotel, the collective agreement will continue to apply but subject to the hotel's right to introduce and negotiate new terms and conditions.

[11] Learned counsel also argued that the learned High Court judge erred in relying on the rule in *Forbes v Git* [1922] 1 AC 256 to the effect that an earlier clause will prevail over a later clause if that later clause destroys the obligation created in the earlier clause. She submitted that cl 3.1 can be read as qualifying rather than destroying the effect of cl 2.1. Further, this rule is a very technical rule, which application directly contradicts with the intent and meaning of s 30(5) of the IRA 1967 and hence should not be relied upon in an industrial law dispute.

[12] Thirdly, learned counsel argued that the Industrial Court award was not irrational or illegal and contained no errors of law. The Industrial Court was correct in applying the *Jengka*'s principles of interpretation. The fact that the learned High Court judge would have come to a different interpretation does not justify him disturbing the findings of the Industrial Court unless it is grounded on irrationality or illegality (*Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 at pp 626–627).

[13] In short, it is the union's case that under the supplementary agreement, upon the re-opening of the new hotel, the supplementary agreement becomes null and void and the collective agreement will continue to apply.

The hotel's argument

[14] The hotel's argument is that clauses in question are inherently contradictory clauses and cannot be read harmoniously. Clause 2.1 of the supplementary agreement ought to prevail so that upon the re-opening of the resort, new terms and conditions as determined by the Hotel would apply.

[15] Firstly, learned counsel for the hotel submitted that the learned High Court judge had correctly construed the supplementary agreement, taking into account the facts and circumstances and the real purpose and intention of the parties in entering the supplementary agreement. The redevelopment exercise undertaken by the hotel involved a complete cessation of business and closure of the hotel for a period of more than 18 months which led to the unavoidable retrenchment of employees of the hotel. Under the supplementary agreement,

A the parties reached a compromise whereby the hotel offered improved retrenchment benefits and agreed to make available 100 job offers to the employees of the old hotel on new terms and conditions.

[16] It was submitted that cl 2.1(d)(i) and (ii) clearly stipulates the right of
B the hotel to set new terms and conditions of employment and to determine the organisational structure, category and positions upon the re-opening of the hotel. As such, the collective agreement referred to and envisaged in cl 3.1 would be the collective agreement embodying the new terms and conditions and organisational structure as provided under cl 2.1(d).

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[17] Secondly, learned counsel argued that on the face of it, cll 2.1(d) and 3.1 are inconsistent and contradictory of each other. As such, the legal principles of interpretation applicable are as stated by Kim Lewinson in 'Interpretation of Contracts' at section 8.08 on 'Internal Inconsistency' at pp 245–248. In
D summary, the principles may be stated as follows:

(a) where the terms of a contract are not internally consistent, the court must do its best to make overall sense and discern the overall intent from the instrument;

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(b) the court should give effect to the part of the contract calculated to carry into effect the real intention of the parties and reject the part which would defeat it;

(c) where there are two clauses in a contract which are inconsistent, the
F court should reject the later clause which defeats the obligation of the earlier clause; and

(d) the court should treat as repugnant a clause which is inconsistent with the main purpose of the contract.

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[18] Learned counsel submitted that cl 3.1 ought to be rejected because it completely defeats the intention of the parties. The union and the hotel had bargained and reached a compromise, whereby the hotel offered improved retrenchment benefits totalling RM21m and agreed to give 100 job offers on new terms and conditions, to enable the hotel to undertake the redevelopment
H exercise. The hotel spent approximately RM98m for the redevelopment exercise, which entailed adopting a new business model with new terms and conditions and organisational structure for it to be viable and sustainable in the long term. To revert to the terms of the CA would have defeated the entire spirit and purpose of the supplementary agreement.

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[19] As such, it was submitted that the court in interpreting the contradictory clauses, should give effect to cl 2.1(d) which carries into effect the real intention of the parties and should reject cl 3.1 which is repugnant and defeats the entire purpose and intention of the parties in entering into the SA (*Forbes v Git*).

[20] Thirdly, learned counsel also submitted that cl 3.1 is a general clause whereas cl 2.1(d) is a specific clause. As such, the court should apply the principle 'generalia non derogant specialibus' which means that the general words do not derogate from particular words. Therefore, the specific cl 2.1(d) should be given precedence over the general cl 3.1 (Kim Lewinson in 'Interpretation of Contracts' on 'Inconsistency with Main Object' at section 8.09 at pp 248–249).

DECISION

[21] We have considered the points canvassed by learned counsel of the parties in their oral and written submissions. We have also carefully considered the learned High Court judge's grounds of judgment.

[22] The learned High Court judge had adverted to the decision of the Court of Appeal in *Jengka* where Gopal Sri Ram JCA (as he then was) said that in construing the collective agreement, the court ought not to be overly legalistic in its approach in trying to decipher the true intent of the contracting parties and that it was important to bear in mind that it was not a commercial agreement. The fact that s 30(5) of the IRA 1967 was referred to was an indication that it should be tempered with equity, good conscience and the substantial merits of the case while at the same time not be bound by technicalities and legal form.

[23] Be that as it may, the learned High Court judge adopted the approach on the basis that social justice in labour jurisprudence is to dispense justice to the deserving party in a dispute. Like all other notions of justice, it favours the party who is in the right. The IRA 1967 is designed to ensure social justice to both employers and employees. Social justice is not to be administered as a monopoly of the employees to the exclusion of the employer. Social justice is to be meted out just as much as it is to be done for the employer (*Chan Hock Liong v Associated Motor Industries (M) Sdn Bhd* [2007] 6 MLJ 323 (CA)).

[24] We agree with the learned High Court judge that the task of construing the supplementary agreement should be undertaken with an appreciation of the factual background. In this case, the redevelopment exercise was a major undertaking. It required the complete cessation of business and the closure of the hotel for a period of 19 months (from 1 December 2004 until it re-opened on 28 September 2006) and the retrenchment of the employees of the old hotel. Meanwhile, in May 2006 the hotel commenced the recruitment of employees for the new hotel. Thereafter, the hotel entered into contracts of employment with the employees of the new hotel on fresh terms of employment.

[25] The learned High Court judge correctly decided on the premise that each case would have to be weighed on its own set of facts on an equal footing, especially so in a case where both parties were on an apparent footing and had been dealing with each other at arm's length. He observed that the two parties have been negotiating collective agreements between them for ten years.

[26] We also agree with the learned High Court judge that read in isolation, the clauses in question was clear on their intent of each of the parties. Read together, they bring uncertainty in deciphering what the real intent of the parties was. Clause 3.1 cannot stand because it defeats the intention of the parties. The hotel and the union negotiated and agreed on a compromise for the redevelopment exercise. Under the supplementary agreement, the hotel agreed to offer improved retrenchment benefits totalling RM20m and further agreed to ensure a minimum of 100 job offers on new terms and conditions. The Hotel spent about RM98m for the redevelopment exercise which entailed adopting a new business model with new terms and conditions and organisational structure for it to be viable and sustainable in the long term. To revert to the old collective agreement would have defeated the entire spirit and intent of the supplementary agreement.

[27] In our view, the learned High Court judge adopted the correct approach in interpreting the contradictory clauses where he held that effect should be given to cl 2.1(d) which carries the real intention of the parties. Clause 3.1 was rejected because it is repugnant and defeats the entire purpose and intention of the parties in entering into the supplementary agreement (*Forbes v Git*; *Nicolene Ltd v Simmonds* [1953] 1 QB 543; *Walker v Giles and Fort* (1848) 6 CB 662; and *Totara Investments Ltd v Crismac Ltd* [2010] NZSC 36).

[28] For the foregoing reasons, we are of the considered view that there are no merits in the appeal. Accordingly, the appeal was dismissed with costs of RM10,000.

Appeal dismissed with costs of RM10,000.

Reported by Afiq Mohamad Noor